SEP 8
JOHN T. FEY

In The

Supreme Court of the United States

October Term, 1956.

No. 112 Misc.

LOYD CARROLL GRANDSINGER, PETITIONER,

V.

STATE OF NEBRASKA, RESPONDENT.

Respondent's Brief in Resistance to Application of Petitioner For Writ of Certiorari.

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OPINION OF THE COURT BELOW

The opinion of the Supreme Court of Nebraska is reported in 161 Neb. 419, 73 N. W. (2d) 632.

JURISDICTION

The petitioner in this case, Loyd Carroll Grandsinger, is asking that a writ of certiorari issue out of this court to review the judgments of the Supreme Court of Nebraska entered in the above cause on February 11, 1956 and June 30, 1956, which affirmed a judgment of the District Court of Cherry County, Nebraska, where

in petitioner had been found guilty by a jury, of murder in the first degree, which jury fixed the penalty at death.

The jurisdiction of this court is sought to be invoked under 28 U. S. C., Section 1257 (3) on the grounds that petitioner was denied due process under the Fourteenth Amendment to the United States Constitution.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States of America, Article XIV, Section 1:

> "* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; * * *."

Nebraska Revised Statutes, Section 25-2121:

> "Every court of record shall have power to punish by fine and imprisonment, of by either, as for criminal contempt, persons guilty of (1) disorderly, contemptuous, or insolent behavior towards the court, or any of its officers in its presence; (2) any breech of the peace, noise, or other disturbance tending to interrupt its proceedings; (3) willful disobedience of or resistance willfully offered to any lawful process or order of said court; (4) any willful attempt to obstruct the proceedings, or hinder the due administration of justice in any suit, proceedings, or process pending before the courts; or (5) contumacious and unlawful refusal to be sworn or affirmed as a witness, and when sworn or affirmed, refusal to answer any legal and proper interrogatory."

Nebraska Revised Statutes, Section 28-728:

> "Whoever, having been called upon by the sheriff or other ministerial officer, in any county in this state, to assist such officer or other officer in apprehending any person charged with or convicted of any offense against any of the laws of this state, or in securing such offender when apprehended, or in conveying such offender to the jail of the county, neglects or refuses to render such assistance, shall be fined in any sum not exceeding fifty dollars."

QUESTIONS PRESENTED

The questions presented by the petition are:

(1) Was petitioner denied due process under the Fourteenth Amendment to the United States Constitution, because of the general incompetence and misconduct of his counsel during the trial, and

(2) Was petitioner denied due process under the Fourteenth Amendment to the United States Constitution, because of the admission in evidence of petitioner's alleged confessions?

STATEMENT OF THE CASE

Petitioner sets forth only a few of the facts of this case and therefor, in view of the issues raised by petitioner we submit a complete summary of the facts as disclosed by the record.[1]

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1. Throughout this brief reference to the typewritten transcript is made by setting forth in parenthesis the capital letter T followed by the page of the transcript, for example, (T26); reference to questions, answers, motions, rulings, or other matter found in the typewritten bill of exceptions is made by setting forth in parenthesis the numbered line and page in the bill of exceptions, for example, (12:156); reference to exhibits in the bill of exceptions is made by setting forth in parenthesis the capital letter E, followed by the number of the exhibit, for example (E25).

Petitioner was charged in an information filed in the District Court of Cherry County, Nebraska, with the shooting and killing, on April 8, 1954, of one Marvin Hansen, a Nebraska Safety Patrolman (T2). Upon trial a jury found him guilty of murder in the first degree, and fixed the penalty at death (T75).

At the time of the commission of the crime petitioner was 21 years of age and had been living at Bell Gardens, California, where he was employed as a receiving clerk. He left California on April 3, 1954, together with an older brother Leon, hereinafter referred to as Leon, in an automobile owned by petitioner. Prior to leaving, petitioner took a gun, a 22 cylinder type pistol, from a trailer house which belonged to a friend, Lester Lynn. Petitioner's car was not in good shape and at various times they did work on it (E19:1).

Along the way petitioner and Leon prowled several cars from which certain articles were taken (E19:5). At Rock Springs, Wyoming, they stole a 1952 or 1953 Ford. At that time petitioner's car had just about quit running and the stolen car was used to tow it the rest of the way. A second gun was stolen along the way, either from one of the prowled cars or from the stolen car (E19:5).

After stealing the car at Rock Springs, Wyoming, petitioner and Leon drove to Valentine, Nebraska, and then to near Springview where they stopped at a hay lot and worked on petitioner's car (E19:6). From there they drove through Wewela, S. Dak., and parked petitioner's car along a creek and then drove to "a farm owned by one of the Wiley boys" where they stole about 20 or 25 gallons of gasoline and a tire.

That evening they called at the farm home of an acquaintance, Bud Frederickson, in Keya Paha County, Nebraska, about 4½ or 5 miles east of the Cherry County line (1:163). They arrived there about 8:30 Wednesday evening (5:165). A brother of Bud Frederickson, Fred, was also there at the time (E19:6). They visited with the Fredericksons for some time and Leon asked Frederickson if he wanted a pheasant which they had in the back of the car, and which petitioner had shot from the car window, with a 22 pistol, as they were driving south of Wewela, South Dakota (21:167).

Leon requested that nothing be said about their being in the country (10:169) because he was wanted for parole violation and some bad checks that he had written in 1949. Leon then showed them a 22 caliber revolver. Also, petitioner and Leon attempted to sell the Fredericksons certain clothing, tires and tools which they had in the car. When asked where they got all the tools, the petitioner answered: "That is a racket man, it is easy to get tools" (16:171).

Petitioner and Leon then told of having another car and that they wanted to change motors because the car they were driving was stolen (17:172). They stated that they then intended to take the car to Council Bluffs and have the motor number ground off and secure a title for the car so they could sell it (20:172). They asked to use Frederickson's barn to change the motor but this request was refused (25:173). Instead Fred suggested that they take the cars out into the sand hills where they could change the motor (9:174). They wanted to take the car body and burn it in order to destroy the evidence (7:193). When asked what they would do if someone came riding up on horseback, the

petitioner replied: "Well, we will bluff them out and if we can't bluff them out we won't let them get away" (20:193). It was suggested that petitioner and Leon bring the other car and Fredericksons would show them the way "as far as the game refuge and from there they would be on their own" (9:175).

Petitioner and Leon left Frederickson's place about midnight and went directly to Wewela, South Dakota, where they burglarized a store and post office of merchandise and cash. They then drove back to Bud Frederickson's place (E25).

They arrived at Bud Frederickson's place at about 5:30 a.m. (17:175). The back seat of the car "was clear full of something" (17:175) and Leon asked if they could unload some groceries and things (6:176). Frederickson refused to let them unload but told them that there was a good place by the river where they could hide the stuff and that he would show them the way to the sand hills that evening and they could then pick up the merchandise when they returned (25:176). They deposited the merchandise in a ravine which was about half a mile back of a schoolhouse located on the river road, but kept two cigar boxes containing cash taken from the Wewela post office. They then went to the home of Fritz Brandenburg for whom petitioner had worked in 1951. Brandenburg gave them breakfast and they visited and also slept for a while at his place, leaving there about 3:00 or 4:00 p.m. (E25). They first drove, by a round about way, to a place where petitioner's car was located. They hitched petitioner's car behind the stolen Ford which they were driving and towed it back to Bud Frederickson's place (E25), arriving there at about 10:10 p.m. (24:178).

After petitioner and Leon had left Frederickson's place that morning Bud and Fred Frederickson had gone to Valentine and reported to the sheriff and Patrolman Marvin Hansen the information they had obtained regarding the petitioner and Leon (25:177; 17:238) and made certain arrangements with them (2:178). Pursuant to these arrangements, when petitioner and Leon arrived that evening, the Fredericksons directed them along a road which took them to the place near Berry Hill on Highway No. 7, where the fatal shooting of Patrolman Hansen took place. Presumably the Fredericksons were showing them a way to the sand hills where they could remove the motor from the stolen car and place it in petitioner's car. The Fredericksons led the way in a car owned by Fred Frederickson. According to instructions given them by the sheriff and Patrolman Hansen, the bulb in the left taillight had been removed (12:182). They were followed by Leon driving the stolen car and towing the petitioner's car which petitioner was guiding (10:182).

That evening William C. Freeman, sheriff of Cherry County, Marvin Hansen, Nebraska Safety Patrolman, Robert E. Hamilton, Mayor of Valentine, Lowell C. Regler, Chief of Police of Valentine, and George Jackson, police officer of Valentine, had gone to the vicinity of Berry Hill (25:238). Sheriff Freeman and Patrolman Hansen were traveling in the sheriff's car which was equipped with two red lights on the front which blinked on and off (17:239), a siren (20:239) and a two way radio. Also, it was equipped with a portable spotlight which was powered by plugging the end of the cord in the lighter socket (15:242). A road block was set up in the vicinity of the Berry Bridge (25:241).

Sheriff Freeman and Patrolman Hansen then drove north on the highway in the sheriff's car while Mayor Hamilton and the two police officers remained at the bridge (5:243). They drove about one-eighth of a mile where they turned around with their car facing south and waited for some time before they saw the headlights of two cars coming from the east (24:243).

The oncoming cars turned south on Highway No. 7 and the first car had the left taillight out (6:244). When the cars had passed, the sheriff started his car with the lights off and drove onto the highway (24:244). They observed that there were two cars in addition to the one with the left taillight out (7:245). The sheriff and Patrolman Hansen communicated with the police car at the Berry Bridge by way of the two-way radio (23:245). The sheriff then turned on the red lights of his car and started the siren (10:246). He stayed behind the two cars (petitioner's and the stolen car) until they pulled to a stop. He was on the east side of the road and turned his car a little to the west so the lights would shine on the cars when he stopped (8:247). Exhibits Nos. 2 and 4 show the positions of the cars after they had stopped (13:247). At the time the cars stopped Patrolman Hansen had the portable spotlight on and was holding this in his hand as he sat on the right-hand side of the car (21:250).

As the cars stopped Leon Grandsinger was sitting in the driver's seat of the front car, with his left hand on the steering wheel and a gun, Exhibit 14, in his right hand (11:51). The sheriff jumped out of his car on the left side and Patrolman Hansen jumped out on the right side (23:251). Patrolman Hansen was dressed

in uniform (1:34; 18:226; E13) and had on his Sam Brown belt (7:34; 21:226). Each had a 38 caliber revolver, which were identical except for the serial numbers (7:225; E12). Leon opened the car door and swung his feet out. He had his gun in his hand and the sheriff ordered him to drop his gun and come out with his hands up (1:252). The sheriff then handcuffed Leon and put him in the seat of petitioner's car and chained him to the car.

When Patrolman Hansen jumped out of the car on the right side, the sheriff heard a car door and quite a bit of noise at the second car (petitioner's car). He heard someone go out the right-hand door, and heard somebody running. He heard Patrolman Hansen holler "Stop!" twice, and after a pause heard him say "Get up", and then he heard a shot. The shot was from a 22 (20:254). After a slight pause there were other shots (23:254) which were "38 and 22's" (16:255). These shots gradually got further away with each shot (2:256).

The sheriff called to the police car on the two-way radio (12:257) and told them to get up there as soon as they could (19:861). Upon the arrival of the police car, Officer Jackson was placed in charge of Leon (9:771) and the sheriff and Chief Regler took flashlights and went to look for Patrolman Hansen (20:257). Chief Regler first observed what appeared to be someone lying on the ground (1:865). He called to him to come out of the ditch with his hands up. He then noticed a slight movement, " and it appeared as though he was in kind of pain". He then rolled over and Regler noticed the Safety Patrol patch on his left

shoulder, and knew that it was Marvin Hansen (4:865). He called to Sheriff Freeman who was near-by and they both arrived at the body at about the same time (17:865). Patrolman Hansen was lying face down and was unconscious (2:258). The distance from Sheriff Freeman's car to where Patrolman Hansen was lying was approximately 211 feet (25:260). While Sheriff Freeman was kneeling beside the body he heard two shots (6:262) from the west and north (8:262) which were fired from a 22 (17:262). At that time all of the persons who were out at the scene, except the petitioner, were known to be east of them.

Patrolman Hansen's gun was just to the left of his body (18:264). All of the cartridges except one had been discharged (20:264). They examined the body and found a bullet hole (3:265) and a hole in his belt where the bullet had entered (19:265). They placed Patrolman Hansen on a stretcher and put him in Sheriff Freeman's car (1:267) who took him to the hospital (15:267).

Dr. J. E. Farner, a practicing physician in Valentine, had been called about midnight and told to come to the hospital as an accident was coming in. When he arrived the body had been taken into the hospital but Hansen was dead at the time of arrival (21:122). He examined the body at that time (7:123) and found a penetrating wound in the area where the bullet passed through the belt and trousers (25:124). This hole was immediately to the left and above the left-hand side pocket (24:125). There was another hole where the bullet had left the body, which was located on the right side below the outer edge of the right hip pocket (7:126).

The next day Dr. Farner performed a post-mortem examination of the body (25:126). He found that the bullet had passed through the aorta (15:138) which is the main artery of the body and travels from the heart down through the chest and through the abdominal cavity (11:141). From his examination Dr. Farner reached the conclusion that the wound was caused by a bullet (10:142) and that Patrolman Hansen's death was caused by massive loss of blood from the aorta (13:142) which was directly due to the wound through the aorta (17:142). He stated as his opinion that it was a wound which could have been produced by a 22 caliber bullet (15:146). Dr. Farner also testified that this type of a wound would not prevent a man of Patrolman Hansen's size from running a distance of from 200 to 250 feet immediately after receiving the wound, before he would fall (17:151 to 25:155).

After Patrolman Hansen had been removed from the scene of the shooting, Chief Regler brought Leon to the police station at Valentine (23:868; 2:870). Mayor Hamilton drove the stolen Ford and Officer Jackson guided the petitioner's car into town (18:869; 17:773). These cars were taken behind the court house in Valentine (7:774). An inventory was taken of the articles found in these cars (E57) which consisted of tools, men's and women's clothing, cigarettes, brief case, electric iron, fishing pole, Christmas tree lights, shells, and a great number of other items, including a 1953 California license plat. Certain of these items (E26 to 43, incl.) were identified by petitioner as having been taken from different cars (5:772 to 21:725).

A posse was organized to search for the petitioner and he was apprehended about 8:00 o'clock the next

morning (24:991). He was first sighted by Fritz Brandenburg, about 80 rods from Brandenburg's house where petitioner and Leon had visited the day before (4:936). When he saw the posse, petitioner jumped into the river but was pursuaded by Brandenburg to surrender (9:939; 7:774). Certain patrolmen and members of the posse arrived and petitioner was searched and handcuffed, then placed in the patrol car and taken away (16:996).

That afternoon, April 9, 1954, petitioner made a written statement (E19) and on April 11, 1954, signed a second statement (E25). Petitioner also testified in his own behalf at the trial. Petitioner admits the stolen automobile, the prowling of numerous automobiles along the way from California to Nebraska and stealing various articles therefrom, thefts in South Dakota, including burglary of the store and post office at Wewela, and, also, admits that the gun in their possession was stolen.

A reading of the entire record clearly and convincingly discloses that at the time petitioner and Leon were stopped by Sheriff Freeman and Patrolman Hansen they were fugitives from justice of the States of California, Wyoming, South Dakota and perhaps Utah. They were also guilty of at least two federal offenses, violation of the Dyer Act, by transporting stolen automobiles across state lines, and burglary of the post office at Wewela, South Dakota. At the time they were on their way to the sand hills in order to remove the motor from the stolen car and place it in petitioner's car and then burn the stolen car in order to destroy the evidence. Their cars were loaded with stolen merchandise. They were fully aware of the consequences

if they should be arrested, and had armed themselves in order that they might kill any person who attempted to stop them.

The evidence further conclusively shows that at the time of the killing, petitioner knew that they were being stopped by police officers. The car had the siren going and the red police lights blinking on and off. Even in his testimony on the witness stand, petitioner admits that he saw the red lights of the sheriff's car before he stopped (6:984). He saw Sheriff Freeman on the left side of his car (17:984). He heard the sheriff shout and saw that he had a gun drawn (1:985). After he had observed all of the foregoing, petitioner reached for his gun and jumped out on the right side of his car (8:985). He admits seeing a person (which had to be Patrolman Hansen), "who said to me just to follow him back behind" (24:985). As Patrolman Hansen backed up petitioner saw that he had a gun in his hand (15:986). Petitioner also admits that he started to walk back, that he took a glance and saw the sheriff and Leon (7:987).

The only material conflict in the evidence is at this point. Sheriff Freeman testified that the first shot fired was from a 22 (20·254). Prior to hearing this shot he heard Patrolman Hansen holler "Stop!" twice, and after a pause heard him twice say "Get up" (7:253). In his first statement (E25) petitioner states that Patrolman Hansen fired a shot at his feet and admits that he (petitioner) started running and fired a shot when he fell over the bank. In his testimony he also states that Patrolman Hansen first fired a shot at his feet (23:987) and that he then started running and that several shots were then fired after him. In his

testimony, however, he denies that he fired the gun that evening (22:990).

Regardless of petitioner's denial of the shooting when called as a witness in his own behalf (a denial which would be expected) the inescapable conclusion which must be reached from the evidence presented, is that Marvin Hansen died as a result of a gun shot fired by the petitioner. The only other 22 available was Leon's gun which was not fired that evening. By far the most convincing proof is that as petitioner jumped from the car with gun in hand he started to run; that Patrolman Hansen twice called to him to stop; that petitioner fell down and Patrolman Hansen twice called to him to get up; and, that petitioner then fired the fatal shot which killed Marvin Hansen.

The only other possible conclusion which could be reached is, that Patrolman Hansen first fired a warning shot in the ground at petitioner's feet. If we accept this as a fact, we cannot ignore the uncontradicted evidence that thereafter petitioner started to run; that Patrolman Hansen called to him to stop; that he fell down and Patrolman Hansen called to him to get up; and, that he then fired the fatal shot. Patrolman Hansen had a perfect right to fire a warning shot and this should have been further notice that these men were officers of the law, there to arrest him. His killing of Hansen can be no more justified if a warning shot was first fired, than it can be if no such shot was fired.

The evidence is conclusive that petitioner armed himself for the express purpose of killing any person who might attempt to stop him. When Patrolman Han-

sen attempted to arrest him he carried out his premeditated plan, shot and killed him. In the performance of their duty the jury could not possibly, under the evidence, have reached any other verdict than "Murder in the First Degree".

ARGUMENT.

I.

Effective Assistance of Counsel

At his trial in the district court petitioner was represented by two attorneys, W. C. Heelan of Valentine, Nebraska and Charles A. Fisher of Chadron, Nebraska. These attorneys were employed by petitioner and his family and were not appointed by the court. Mr. Heelan (now deceased) had been engaged in the active practice of law for more than forty years and for a number of years during that time had been the prosecuting attorney for Cherry County, Nebraska. He was a competent attorney and highly respected in the community. Charles A. Fisher, for more than twenty-five years had practiced law at Chadron, Nebraska, a distance of approximately 125 miles from Valentine. Mr. Fisher, a highly respected lawyer, was regarded as a very able trial lawyer, particularly in the defense of criminal cases, and had with one or two exceptions, defended more first degree murder cases than any other Nebraska lawyer.

The record discloses that these attorneys conducted a vigorous defense in behalf of petitioner throughout the trial and prosecuted an appeal to the Supreme Court of Nebraska after judgment of conviction. No-

where does the record disclose that Counsel were not exerting their best efforts in petitioner's behalf. Present Counsel, however, charge original defense Counsel with "general incompetence" because certain things might have been done which *perhaps* would have been to the benefit of petitioner. In viewing the cold record present Counsel attempt to show certain failures in the defense which in their opinion disclose this general incompetency. (Pages 11 & 12 of Petition). One of the charges made is that "Defense Counsel had failed to request a change of venue despite evidence of strong feeling against defendant because of his Indian extraction". Where in the record can Counsel point to any evidence that petitioner is an Indian? The fact is that he is not an Indian but is at the most, 3/32 degree Indian blood. The fact of his having any Indian blood, however, was not presented to the jury, was not published in the newspapers of the community and was not generally known at the time of the trial. The first publicity regarding this matter came after his trial and conviction and after the affirmance by the Nebraska Supreme Court when certain individuals, interested in upsetting the conviction, issued public statements and press releases to the effect that petitioner was an Indian and that his conviction was the result of race prejudice. Undoubtedly, defense Counsel knew that there was no evidence of prejudice which could constitute the basis for a change of venue and for that reason made no request therefor. Defense Counsel in a criminal case is not required to present every known defense in order to meet the requirements of due process guaranteed by the Fourteenth Amendment. Particularly, Counsel is not required to manufacture a false defense in order to meet these standards. Counsel were conducting a

vigorous defense and there is every reason to believe that had they felt that grounds existed for a change of venue such a request would have been made.

True, a posse had been organized to conduct a search for the killer of Marvin Hansen but did this indicate a prejudice which would prevent a fair trial to one accused of the murder? A law enforcement officer whose sworn duty it was to protect the lives and property of the citizens of Nebraska had been killed in the performance of that duty. Naturally, an aroused citizenry was willing to aid in the apprehension of the person suspected of the killing. Under Section 28-728, Reissue Revised Statutes of Nebraska, 1943, it is the right of every citizen, when a crime has been committed in his presence or within his knowledge, to assist in the pursuit and apprehension of one detected in its commission or under reasonable suspicion of fleeing from justice after perpetrating the unlawful act and the moral duty to lend aid under such circumstances becomes a legal duty when the citizen is called upon by a peace officer. *Sackett* v. *Masonic Protective Ass'n.*, 106 Neb. 238, 183 N. W. 101. The fact that petitioner was apprehended through the assistance of a posse creates no more presumption of the guilt of the accused or of prejudice in the community than if the apprehension had been by the peace officers alone.

Present Counsel also contend that the general incompetency of original defense counsel is disclosed by their failure to cross-examine state's witnesses with reference to certain claimed inconsistency in the prosecution's evidence. It is difficult to understand how cross-examination of state's witnesses would have aided

in disclosing the inconsistency. If there was an inconsistency, as claimed, this evidence was before the jury and the effective manner to call such inconsistency to the attention of the jury was in the oral argument of counsel. Is the court now permitted to presume that Counsel failed to argue matters favorable to petitioner and charge them with incompetency without anything to support such conclusion except the conclusion contained in the Petition herein?

Reviewing the record, present Counsel find many matters, which in their opinion, were improperly handled and therefore they charge "general incompetency" of original Counsel. Presumably, present Counsel would have handled such matters differently but we question if their record, had they been employed during the trial, would not have been subject to criticism by other Counsel upon examination with a critical eye. The most able lawyer is not without error and we doubt if any lawyer has ever read a record of his case without a knowledge that certain matters could have been better done. This, however, does not establish "incompetence" of Counsel.

The misconduct of Mr. Fisher coupled with this alleged general incompetence of Counsel is asserted as a denial of the effective assistance of Counsel under the Fourteenth Amendment. Counsel attempt to paint a picture of great prejudice because of such misconduct coupled with the acts of the prosecuting attorneys and the court with reference thereto. The portrait, however, does not fit the facts.

We are in no manner attempting to condone the conduct of Mr. Fisher in tampering with the evidence re-

gardless of whether he was prompted by an overzealous desire to aid his client or this was merely a thoughtless act performed during an examination of the exhibit. In either event the bullet hole in Exhibit No. 10 had been enlarged and the exhibit was not in the same condition as it was when introduced in evidence.

When this fact came to the attention of prosecuting Counsel they immediately called it to the attention of the court, out of the presence of the jury (6:1234). The prosecution desired to present to the jury the fact that the exhibit had been altered. Can it be denied that the State was entitled to have the jury informed that the exhibit had been altered after being received in evidence? Should prosecuting Counsel have submitted the case to the jury with an exhibit altered in such a manner that an examination thereof could readily have lead the jury to disbelieve the testimony of the State's witnesses relating to the caliber of the bullet which had penetrated Marvin Hansen's belt? Due process does not require that such material fact be kept from the knowledge of the jury.

The proceedings had in the presence of the jury (6: 1234; 18:1235) are set forth on pages 4 and 5 of the Petition for Certiorari. This record discloses that in an orderly manner and without any attempt to create prejudice, the special prosecutor stated what had transpired in relation to Exhibit No. 10. True, it was stated that Mr. Fisher was the one, who, while examining the exhibit, had taken a dowel and pushed it through the hole in the belt hard enough to materially enlarge the size of the hole. The record discloses that nothing was said by either prosecuting Counsel or the court which even implied that this act by Mr. Fisher was done in-

tentionally or for any dishonest purpose. The reviewing court must guard against magnification on appeal in a criminal case of incidents which were of little importance in their setting. *Glasser* v. *United States,* 315 U. S. 60, 86 L. Ed. 680.

Mr. Fisher's admission that in examining the exhibit he had pushed the dowel through the hole in the belt hard enough to materially enlarge the hole is not a confession to a crime under Section 25-2121, Reissue Revised Statutes of Nebraska, 1943, as contended by the Petition herein. This statute makes criminal contempt "* * * (4) any *willful* attempt to obstruct the proceedings, or hinder the due administration of justice in any suit, proceedings, or process pending before the courts; * * *." (Emphasis Supplied). Unless the act is willful, it is not contempt. *Whipple* v. *Nelson,* 138 Neb. 514, 293 N. W. 382.

It is a well known fact that during the course of a trial, counsel, by their acts or statements, frequently antagonize a jury. It is just as reasonable to argue that in every such case the conduct of counsel was prejudicial to the defendant and destroyed his effectiveness as counsel, thus denying to the defendant due process. The requirements of due process under the Fourteenth Amendment have never been held to embrace such a speculative prejudice and to so hold would create a situation which would make it almost impossible to sustain any criminal conviction.

Present Counsel also argue that Mr. Fisher should have withdrawn as Counsel following this episode. We submit that had Mr. Fisher withdrawn from the case present Counsel would have had a far stronger case for

arguing the lack of effective assistance of Counsel and had the court required him to withdraw we are certain that the court would now be charged with a sinister motive.

Petitioner relies upon the case of *Glasser* v. *United States,* 315 U. S. 60, 86 L. Ed. 680, as authority for the proposition that Counsel in the instant case were ineffective and that therefore petitioner was denied due process under the Fourteenth Amendment.

In the *Glasser* case this court held that it was prejudicial error on the part of the trial court to designate counsel for Glasser to also represent a co-defendant, after Glasser had expressed an objection to the proposed designation, since the case against Glasser was not a strong one, and the failure of counsel to cross-examine one of the witnesses and object to the introduction of certain testimony as being inadmissible against Glasser was influenced by Counsel's desire to protect his other client.

In the instant case the act of Mr. Fisher, which it is claimed caused him to abandon his obligation to his client, occurred after the completion of the taking of evidence in the case and could not have affected his conduct toward his client's cause during the course of the trial. The record discloses a vigorous defense throughout the trial. The claimed abandonment of his client's cause is not borne out by the record. Counsel prosecuted an appeal to the Nebraska Supreme Court and there is no evidence of his having abandoned his client's cause except the assertion of present Counsel that he should have raised certain constitutional questions, including the matter of his own misconduct.

What consideration of the trial court with reference to this matter, however, was before the Nebraska Supreme Court and if the failure to raise this question or the other constitutional question now presented was in any manner prejudicial to petitioner such prejudice was removed when the Nebraska Court granted petitioner leave to file his amended and supplemental motion for rehearing and relief in support of the same.

Another distinguishing factor between the instant case and the *Glasser* case is that in the *Glasser* case it was held that the case against Glasser was not a strong one. Here, contrary to petitioner's contention, a fair reading of the record presents a case against petitioner which is convincing to such an extent that it is unreasonable to assume that the jury could have reached any other conclusion than that petitioner was guilty of murder in the first degree.

V

Use of Petitioner's Statements

The second question presented by the petition for certiorari is whether the admission and use of petitioner's "confessions" constitute denial of due process under the Fourteenth Amendment. First, we wish to point out that these so called "confessions" are not confessions to the crime charged but are statements which contain admissions of certain facts which have a bearing upon the crime charged. The first such statement (Bill) given to the officers the day of his arrest admits facts prior to, at the time, and subsequent to the time that Marvin Hansen was shot but is in fact an exculpatory statement as to the crime charged. The second

statement (E25) was given two days later to George H. Fiein, a United States Post Office Inspector, in the presence of James F. Shoemaker, the sheriff of Tripp County, South Dakota and Frank B. Cole, the Postmaster at Wewela, South Dakota. This statement is principally an admission to the burglary of the Post Office and a store at Wewela, South Dakota the night prior to the time the shooting of Marvin Hansen occurred. The Nebraska Supreme Court held evidence of prior crimes from which petitioner was fleeing admissible for the purpose of showing motive for the killing. *Granadamayer v. State*, 161 Neb. 419, 73 N. W. (2d) 632. But these admissions, either singly or collectively, do not constitute a confession of the crime charged. In these statements petitioner denies that he ever purposely and deliberately shot Marvin Hansen or that when he took the pistol from the car he had any intent of using the same to prevent capture or to effect his escape. Instruction No. 6 (T48) (Appendix A) given by the court informs the jury that unless they are satisfied by the evidence beyond a reasonable doubt of the truth of certain material elements they must find the petitioner "not guilty". The court then instructs the jury as to essential elements of the various degrees of homicide as follows: First Degree Murder, Instruction No. 7 (T50) (Appendix B); Second Degree Murder, Instruction No. 8 (T51) (Appendix C), and Manslaughter, Instruction No. 9 (T52) (Appendix D).

The statements of petitioner, introduced in evidence, cannot be construed to be confessions to any of these three degrees of homicide.

Admissions made of one, but not all of the essential elements of the crime does not amount to a confession.

Bush v. *State* 112 Neb. 384, 199 N. W. 792. Everything contained in these statements might be true and yet petitioner might not be guilty of the crime. Such statements are admissions of certain facts but are not confessions. *State* v. *Gibson*, 69 N. D. 70, 284 N. W. 209. Due process of law does not require that a state impose the same requirements for admissibility on a coerced admission of a specific fact as it does on a coerced confession. *Stein* v. *New York*, 346 U. S. 156, 97 L. Ed. 1522, 73 S. Ct. 1077. Nevertheless, the trial judge imposed all of the restrictions applicable to a confession. Prior to admitting these statements, Exhibits 19 and 25, into evidence the court conducted a hearing out of the presence of the jury which lasted almost a day and a half (5:342 to 14:581). At the conclusion of this hearing the court made the following pronouncement:

> "Well, of course there are some conflicts in the testimony but the court having heard it and observed the witnesses, their demeanor, finds the evidence is not inadmissible as a matter of law" (11:581).

Thereafter, defense counsel presented to the jury testimony regarding all of the claimed circumstances relating to the giving of the statements, including cross-examination of the State's witnesses. The court, in Instruction No. 21 (T66) (Appendix E), instructed the jury that before they could consider any such alleged statements or admissions as evidence, they must be satisfied and believe from the evidence:

> "1. That such statements or admissions were by the defendant;
>
> "2. That at the time same were made the defendant was mentally capable of making the same;

that he understood what he was doing, and the effect thereof, and;

"3. The same were made freely and voluntarily and not by reason of any hope or fear on his part or by reason of any promises, threats, inducements, coercions, or compulsions of anyone."

This record discloses that the trial judge exercised the utmost caution in protecting the rights of petitioner with reference to these statements. In spite of the fact that they were mere admissions of fact and not confessions, he applied all of the safeguards required for confessions. First he heard testimony, for almost one and one-half days, as to the voluntary character of the statements before admitting them in evidence. After the evidence had been presented to the jury he instructed the jury that such statements could not be considered unless they first determined from the evidence that the statements were voluntary. The Supreme Court of Nebraska has affirmed. The constitutional requirement of due process in a criminal trial in a state court is satisfied by an instruction as to the voluntariness of a confession given in evidence against the accused which in the opinion of the state courts, is sufficiently specific. *Lyons* v. *Oklahoma*, 322 U. S. 596, 88 L. Ed. 1481, 64 S. Ct. 1208. It is difficult to conceive any manner in which the Nebraska Court could have more fully protected petitioner than was done in this case.

As stated by Mr. Justice Jackson in the majority opinion of this court in *Stein* v. *New York*, 346 U. S. 156, 97 L. Ed. 1522, 73 S. Ct. 1077:

"It is common courtroom knowledge that extortion of confessions by 'third-degree' methods is

charged falsely as well as denied falsely. The practical problem is to separate the true from the false. Primarily, and in most cases final, responsibility for determining contested facts rests, and must rest, upon state trial and appellate courts.

"A jury and the trial judge—knowing local conditions, close to the scene of events, hearing and observing the witnesses and parties—have the same undeniable advantages over any appellate tribunal in determining the charge of coercion of a confession as in determining the main charge of guilt of the crime. When the issue has been fairly tried and reviewed, and there is no indication that constitutional standards of judgment have been disregarded, we will accord to the state's own decision great and, in the absence of impeachment by conceded facts, decisive respect. Gallegos v. Nebraska, 342 US 55, 60, 96 L ed 86, 91, 72 S Ct 141; Lyons v. Oklahoma, 322 US 596, 602, 603, 88 L ed 1481, 1485, 1486, 64 S Ct 1208; Lisenba v. California, 314 US 219, 86 L ed 166, 62 S Ct 280."

It is also contended by petitioner that the delay in his arraignment and preliminary hearing from 3:00 p.m. Friday until some time the following Monday was unreasonable as a matter of law. The law in Nebraska on this matter is set forth in the opinion in *Gallegas* v. *State*, 152 Neb. 831, 43 N. W. (2d) 1, as follows:

"* * *

"In regard to how soon after a person is arrested he must be given a preliminary hearing we said in Maher v. State, 144 Neb. 463, 13 N.W. 2d 641: 'The question as to the time in which the defendant should be given a preliminary hearing is a question for the court. There can be no precise length of time, after the arrest of a person, in which he must be given a hearing. The theory of the law is that he must be given a hearing as soon as possible. A

person charged should be given a preliminary hearing just as soon as the nature and circumstances of the case will permit.'

"* * *

It is difficult to understand how, under the circumstances in this case, the claim can be made that the failure to arraign petitioner until Monday was unreasonable as a matter of law. On Thursday, near midnight a patrolman had been shot and killed. On Friday petitioner was apprehended and placed under arrest, suspected of the killing. The first duty imposed upon the officers of the State was to determine the nature of the charges to be filed against petitioner, whether murder in the first degree, murder in the second degree or manslaughter. This would necessarily involve an investigation of the facts, examination of evidence and interrogation of witnesses, including petitioner. The mere questioning of one under arrest, prior to arraignment or the filing of charges has never been held to constitute a denial of due process *Lyons* v. *Oklahoma*, 322 U. S. 596, 88 L. Ed. 1481, 64 S. Ct. 1208. Had petitioner been charged with first degree murder and arraigned immediately upon his arrest without such an investigation the basis for charging state officers with prejudice would be far greater than under the present record. It seems to us that public officials should be encouraged to ascertain the facts before charges of murder are brought against any person and in order that this be done, in many cases, it is necessary that a reasonable time intervene between the arrest and the arraignment. The contention that in this case there was unnecessary delay is merely another baseless claim made in an effort to show a lack of due process.

CONCLUSION

We are fully aware of the duty of this court to review the decisions of state courts where it appears that the state courts have violated the fundamental principles of liberty and justice protected by the Fourteenth Amendment against infraction by any state. This case, however, presents no such situation.

The record discloses that petitioner was given a fair trial and that the trial judge was most careful and considerate in protecting these fundamental rights. Petitioner was ably represented by counsel of his own choice and all of the facts were presented to the jury for their consideration. The record was reviewed by the Nebraska Supreme Court and found to be without prejudicial error. Under these circumstances the petition does not present a proper case for review by certiorari and should be denied.

Respectfully submitted,

CLARENCE S. BECK,
Attorney General of Nebraska,
ROBERT A. NELSON,
Assistant Attorney General of Nebraska,
Counsel for Defendant.

APPENDIX

A

Instruction No. 6.

Your verdict in this case must be "not guilty" unless you are satisfied by the evidence beyond a reasonable doubt of the truth of all three of the following material elements, to-wit:

1. That the defendant, Loyd Carroll Grandsinger, shot and killed Marvin Hansen with a pistol as charged.

2. That he did so in Cherry County, Nebraska.

3. That he did so on or about April 8, 1954.

If the evidence does not satisfy you beyond a reasonable doubt of the truth of all three of the above material elements, or, in other words, if you have a reasonable doubt as to any one or more of the above three elements, you must find the defendant not guilty, and render your verdict upon the appropriate form and if you so find you need proceed no further.

However, if you are satisfied by the evidence beyond a reasonable doubt of the truth of all three of said elements, you will then consider the next material element, to-wit:

4. That at the time of the killing the defendant was not insane, as hereinafter explained.

If you are not satisfied beyond a reasonable doubt that the defendant was then not insane, or, in other words, if you have a reasonable doubt as to whether the defendant then possessed the necessary mental capacity,

as hereinafter explained, then your verdict must be "not guilty by reason of insanity", and if you so find, you will use the appropriate form to render your verdict, and in such case you need proceed no further.

If, however, you are satisfied by the evidence beyond a reasonable doubt of the truth of all four of the above material elements, you will then determine whether the defendant is guilty of murder in the first degree.

GIVEN:

E. L. MEYER
Judge

B

Instruction No. 7

The next material and essential element of the crime of murder in the first degree as charged in this case is as follows:

> That the defendant killed Marvin Hansen purposely and of his deliberate and premeditated malice.

If the evidence satisfies you beyond a reasonable doubt of the truth of the above material element in addition to the four elements mentioned in Instruction No. 6, then your verdict should be guilty of murder in the first degree, and in such case you should state that you so find in the appropriate form of verdict, and also whether the penalty should be life imprisonment or death.

If, however, the evidence does not satisfy you beyond a reasonable doubt of the truth of the above material

element then you cannot find the defendant guilty of murder in the first degree.

If, you are not satisfied beyond a reasonable doubt that the defendant is guilty of murder in the first degree, then you will consider whether the defendant is guilty of murder in the second degree.

GIVEN:

E. L. MEYER
Judge

C

Instruction No. 8.

The material element of murder in the second degree, is as follows:

> That the defendant killed Marvin Hansen, purposely and maliciously but without deliberation and premeditation.

If you are satisfied by the evidence beyond a reasonable doubt that the defendant killed Marvin Hansen purposely and maliciously but do not find that said killing was done with deliberation and premeditation, and if you also are satisfied beyond a reasonable doubt of the truth of the four elements mentioned in Instruction No. 6, then your verdict should be guilty of murder in the second degree, in which case you will make your return on an appropriate form, but need not consider or specify the penalty.

If on the other hand you are not satisfied beyond a reasonable doubt of the guilt of the defendant of murder in the first degree, or murder in the second degree, you will then determine whether the defendant is guilty of manslaughter.

GIVEN:

E. L. MEYER
Judge

D

Instruction No. 9.

The essential element of manslaughter as applied to this case is as follows:

That the defendant unlawfully killed Marvin Hansen without malice while he was in the commission of some unlawful act.

If you are satisfied by the evidence beyond a reasonable doubt that at the time and place in question the defendant and his brother were traveling and acting together, and at that time had in their possession an automobile which was stolen, and which they knew to be stolen, and other articles that had been stolen by them, and that they had not been arrested or tried for said crimes, that at that time they were traveling to a secluded spot for the purpose of together stripping the automobile, which was not theirs, and removing the engine therefrom, and placing it in the automobile owned by the defendant; and then burning the other car; that they deliberately armed themselves with deadly weapons for the purpose of using the same to prevent being

captured, if apprehended or accosted by officers, or to effect their escape, and if you further find that at the time when the defendant and his brother was stopped by Hansen and Freeman, the defendant recognized Hansen as a patrolman or officer of the law, and that when the defendant got out of the car he deliberately took a loaded pistol with the intention of using same to prevent capture or to effect his escape, and that said pistol in some manner was accidentally discharged, causing Marvin Hansen's death as charged, and if you are further satisfied by the evidence beyond a reasonable doubt of the truth of the four elements in Instruction No. 6, then your verdict must be guilty of manslaughter, in which case you will return your verdict upon the appropriate form and it will not be necessary to specify or consider the penalty.

If, however, the evidence does not satisfy you beyond a reasonable doubt of the truth of the above elements, then, you cannot find the defendant guilty of manslaughter.

GIVEN:

E. L. MEYER
Judge

E.

Instruction No. 21.

The State has offered in evidence alleged statements and admissions claimed to have been made by the defendant. The defendant contends not only that these statements were not voluntarily made but also that

they do not correctly reflect what he said or meant. Before you can consider any such alleged statements or admissions as evidence, you must be satisfied and believe from the evidence:

1. That such statements or admissions were made by the defendant;

2. That at the time same were made the defendant was mentally capable of making the same; that he understood what he was doing, and the effect thereof, and;

3. That same were made freely and voluntarily and not by reason of any hope or fear on his part or by reason of any promises, threats, inducements, coercions, or compulsions of anyone.

In determining these questions you should consider all the evidence given in the trial of this case, examining and analyzing it carefully, taking into consideration the position of the defendant at the time such alleged statements or admissions are claimed to have been made by him, the circumstances surrounding him, the credibility of the witnesses detailing the circumstances, defendant's strength or weakness of mind and body, his mental and physical condition as shown by the evidence, the probability or improbabilty of the alleged statements or admissions, and whether the same, if made by the defendant were made by reason of any hope or fear on his part or induced by any promises, threats, inducements, coercions or compulsions.

If you are satisfied by the evidence that any such statement or admission was made by the defendant,

and that the defendant knew at the time what he was doing, and was mentally capable of making the same at the time and that same was freely and voluntarily made by him, and not induced by any promises, threats, inducements, coercions or compulsions on the part of anyone, then you should consider any such statement or admission so made and give the same such credence and weight as you deem it entitled to receive, and if the jury believes all or the whole of any statement or admission to be true, they should act upon the whole as true. But the jury may believe part of any such statement or admission and reject the balance, if they see sufficient grounds in the evidence for so doing.

On the other hand, even if you believe any statement or admission to be true you should wholly disregard and not consider any statement or admission in evidence, if you are not satisfied from the evidence that the same was made by the defendant, that it correctly reflects what the defendant said or meant, and that at the time of making the same he knew what he was doing and the effect thereof, that he was mentally capable of doing so, and that same was made voluntarily and freely by the defendant, and not induced by any hope or fear on his part or by reason of any promise, threat, coercion or compulsion of anybody.

GIVEN:

E. L. MEYER
Judge